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No. 06-1109

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IN THE

Supreme Court of the United States

JOHN WELLS,

Petitioner,

v.

JAMES R. LAMZ, TOM W. THORNHILL; COMMITTEE TO ELECT JIM LAMZ; THORNHILL LAW FIRM, LLC; CHARLES C. FOTI, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAMES "JIM" LAMZ

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INTRODUCTION

Petitioner Wells has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* to be granted ("Petition"). See Supreme Court Rule 10. Specifically, Petitioner fails to demonstrate that the Fifth Circuit's November 13, 2006 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. See Supreme Court Rule 10(a)-(c). Therefore the Petition should be denied.

Petitioner first contends that the Fifth Circuit erred in affirming the District Court's Motion to Dismiss, when the Court had jurisdiction to hear the case under the Declaratory Judgment Act and the Eleventh Amendment did not bar the action, on contravention of this Court's precedent and the holdings of other circuit courts of appeal. As to this first question presented, Respondent Lamz respectfully disagrees and will defer to the briefs of other Respondents including Charles C. Foti, Jr., Attorney General of the State of Louisiana, as to the constitutionality of the state statute at issue.

Respondent Lamz respectfully disagrees with the second question presented by Petitioner. The Fifth Circuit correctly affirmed the District Court's granting of the Motion to Dismiss against all defendants. Both Courts appropriately found that there was no deprivation of the Petitioner Wells' protected First Amendment Right to freedom of speech and further that the filing of a request for a Temporary Restraining Order as provided for in Louisiana Election Code under LSA-R.S. 18:1463 by then candidate for judge and private citizen Lamz was not an action which would constitute "state action".

Petitioner herein has failed to show that the actions of the District Court and the Fifth Circuit Court of Appeals are in contravention of this Court's legal precedent or the holdings of other circuit courts of appeal. Simply put, Petitioner has failed to completely carry his burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition for Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

This matter stems from a Louisiana state court lawsuit that was filed prior to the election for Slidell City Court Judge held on November 2, 2004. The Plaintiff, John B. Wells and the Defendant, James R.E. Lamz were candidates in the election. On November 3, 2004, Lamz was declared the winner of the election and is now presiding as Judge of Slidell City Court for the State of Louisiana.

In his Complaint Petitioner Wells alleges that Lamz, through his counsel, defendants Thornhill and Thornhill Law Firm LLC, filed a petition for injunctive relief in state court on October 29, 2004, alleging that Wells' campaign material violated La. R.S. 18:1463 of the Louisiana Election Code. (Complaint ¶ XXXII) Wells further alleges that the petition seeking injunctive relief, filed on behalf of Lamz, was filed to prevent Wells from airing commercials or mailing campaign literature. (Complaint ¶ XXXII) In his complaint, Wells acknowledges that on the same day, October 29, 2004, the State District Court denied Lamz's motion for a Temporary Restraining Order. (Complaint ¶ XXXIII)

On the day following the election, November 3, 2004, Lamz filed a Supplemental and Amending Petition for Injunctive Relief and Damages. On that day, Wells filed a Special Motion to Strike pursuant to the Louisiana Code of

Civil Procedure. Again Wells specifically acknowledges in the pleadings filed on November 3rd that the State District Court had denied Lamz's request for TRO on the same day it was filed on October 29th. (at ¶ XLII and ¶ XLIII)

Petitioner Wells alleges that he was deprived of his constitutional rights under 42 U.S.C. §1983. Wells alleges that Lamz's counsel, Thornhill, acted under the color of state law by filing the petition on October 29, 2004, for the purpose of denying Wells his right to free speech guaranteed by the First and Fourteenth Amendments of the Constitution. However, it is most important to note that at no time prior to or including the date of the election was the distribution or publication of Wells' campaign materials ever restrained or prohibited in any way. In fact, the Temporary Restraining Order (TRO) filed by Lamz was acted upon quickly by the state court. The TRO was denied on October 29, 2004, the same day it was filed and days *before* the scheduled election of November 2, 2004. In short Petitioner Wells was successful in the state court and suffered no deprivation of any constitutionally guaranteed rights.

In his Complaint to the United States District Court for the Eastern District of Louisiana, Petitioner Wells alleges that Defendant Lamz acted under the color of state law by seeking recourse in the district courts of the State of Louisiana. Petitioner alleges that Lamz's actions of seeking legal redress in the form of a Request for TRO under the provisions of the Louisiana Election Code pursuant to LSA-R.S. 18:1463 caused Wells to lose the election. Furthermore, Petitioner Wells alleges that Lamz conspired with others to limit and restrict Wells' rights to free speech thus violating his rights under 42 U.S.C. §1985. Petitioner's allegations are not well founded.

Defendant Lamz filed an Answer to the Complaint denying the allegations contained therein and then filed a Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6). Similar motions were filed by all of the other named defendants in this action on the same legal principles. On July 13, 2005, Judge Stanwood R. Duval Jr. granted the Motions to Dismiss filed by each defendant. The District Court issued judgment in favor of defendants and against plaintiff Wells dismissing plaintiff's federal law claims with prejudice and dismissing plaintiff's state law claims without prejudice.

Petitioner Wells then filed a timely notice of appeal. The matter was briefed and ultimately Oral Argument was afforded to all before the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the District Court ruling in favor of defendants and against plaintiff Wells dismissing plaintiff's federal law claims with prejudice and dismissing plaintiff's state law claims without prejudice. Petitioner Wells then filed a timely Petition for Writ of *Certiorari* to this Court.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. See Supreme Court Rule 10.

THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF DEFENDANT LAMZ'S MOTION TO DISMISS: THE DECISIONS BELOW ARE ENTIRELY CONSISTENT WITH *LUGAR*

Petitioner Wells did not establish a claim under 42 U.S.C. § 1983 in the trial court. In *Daniel v. Ferguson*, 839 F.2d

1124 (5th Cir. 1988), the court stated that to prevail under 42 U.S.C. §1983, a plaintiff must prove "(1) that he has been deprived of a right secured by the Constitution and the laws of the United States and (2) that the persons depriving him of this right acted under 'color of state law' of the state." *Id.* at 1128. This Court has applied a two-prong analysis, indicating that private conduct "fairly attributable to the state" may also be actionable under 42 U.S.C. § 1983. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185(1978).

To satisfy the first prong, Petitioner Wells must prove that Defendant Lamz deprived Wells of some right secured by the Constitution and laws of the United States. In order to satisfy the second prong Petitioner Wells must prove that Defendant Lamz was acting under the color of state law. *Adickes v. S.H. Kress & Co.*, 389 U.S. 144 (1970); and *Flagg Brothers, Inc.*, 436 U.S. 149 at 155. Simply stated, at no time was Lamz a state actor nor did he act under the color of state law. As a judicial candidate and private citizen, Lamz utilized the provisions of the Louisiana Election Code under LSA-R.S. 18:1463 and filed a TRO with the state court due to his concerns of improper campaign practices by Wells. The reference in the petition for TRO of the criminal sanctions specifically provided for in the statute does not in and of itself rise to the level of state actor. Nor does that fact that Lamz was an attorney at law actively running for judge make him a state official. Petitioner Wells has repeatedly failed to satisfy both prongs of the analysis in *Lugar*. Accordingly, the District Court appropriately granted the Motions to Dismiss and the Fifth Circuit correctly affirmed.

FIRST PRONG: PLAINTIFF WELLS WAS NOT DEPRIVED OF ANY FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

In this case, Petitioner Wells alleges that he was deprived of his constitutional rights to free speech as guaranteed by the First and Fourteenth Amendments as a result of the filing of a state court petition on behalf of Defendant James Lamz for injunctive relief (TRO) dealing with campaign issues. Petitioner Wells claims that the sole purpose for the filing for the TRO was an attempt by Lamz to deny Plaintiff Wells of his right to free speech. Specifically Wells alleges in the Complaint (¶ XXXII) that suit was filed on October 29, 2004 for injunctive relief by Lamz in state court. Then, in the following paragraph of his Complaint (¶ XXXIII), Plaintiff Wells acknowledges that the state court petition seeking injunctive relief filed on behalf of Lamz was denied the very day it was filed – October 29, 2004. These statements by Petitioner are correct. The TRO was filed and was denied by the state court on the same day.

There is no question that the TRO sought by Lamz was promptly denied by the state court on the very day that it was filed. The state court found that Lamz could not carry his burden as required under Louisiana law in seeking injunctive relief. The state court ruling was therefore not a finding of fact, but a denial of injunctive relief as requested. Therefore, as a result of the ruling by the state court, there was nothing to prohibit, delay or restrain the publication, distribution or dissemination of any of Petitioner, and then candidate, Wells' campaign materials prior to the election of November 2, 2004.

In reality, Mr. Wells was the victor in the state court since Lamz's Request for TRO was denied. At no time was Wells ever deprived of a right secured by the Constitution or laws

of the United States. Plaintiff Wells had every opportunity to continue to campaign until the close of the election on November 2nd. At no time did the state court ever issue any type of injunction denying Plaintiff Wells' right to free speech or in any way restricting any of Wells' campaigning including public appearance, content of campaign materials or running television and/or radio advertisements.

THE DISTRICT COURT BELOW CORRECTLY APPLIED THE HOLDING IN *COLSON v. GROHMAN* TO THE CASE *SUB JUDICE*

Petitioner's brief is wholly silent and simply ignores the precedent in the Fifth Circuit which is in harmony with the law of this Court and other Circuits in the case of *Colson v. Grohman*, 174 F.3d 498 (5 Cir.1999). In its finding that Wells was not deprived this matter, the District Court relied heavily on the case of *Colson*. In *Colson*, the plaintiff, a former city counsel member, brought a civil rights action against various city officials including the police chief for their alleged violations of her right to free speech and her Fourteenth Amendment rights. The matter was removed to the United States District Court to pursue actions for defamation, libel, due process violations and allegations under 42 U.S.C.§ 1983 for violations of her rights under the First and Fourteenth Amendments. All defendants filed motions for summary judgment as to Colson's § 1983 claims and contended that Colson had failed to allege any deprivation of a cognizable constitutional right. (*Id.* at 505) The District Court granted the Defendants' Motions for Summary Judgment on the First and Fourteenth Amendment claims and dismissed those claims. Colson then appealed.

The Court of Appeals on review held that the actions of the defendants' including false charges and circulation of unfounded recall petition against the city counsel member

Colson in alleged retaliation for Colson's exercise of her own free speech rights, were not sufficiently serious either individually or as part of a campaign of retaliatory harassment to rise to the level of First Amendment violation.

In the case *sub judice,* the District Court below cited *Colson* at length noting the "very complex factual pattern" that presented itself therein. The Fifth Circuit Court of Appeals in *Colson* specifically made great effort to describe "in detail the long and tortured history" of the *Colson* case "[b]ecause the precise nature of the harms suffered by a plaintiff claiming First Amendment retaliation is crucial to our determination of whether she has alleged a constitutional deprivation,". (*Id.* at 500) In *Colson*, the alleged harassing actions of defendants occurred over a two year period from the time Colson was elected in 1992 until the grand jury was empanelled in early 1994 to examine charges of retaliation and coercion. The grand jury returned a no true bill on both charges. (*Id.* at 504) In May of 1994, Colson lost her reelection bid by a wide margin. (*Id.* at 504)

In examining the allegations asserted by the plaintiff Colson, the Fifth Circuit Court of Appeals specifically noted "[w]e first emphasize what did not happen: Colson was never arrested, indicted, or subjected to a recall election. Nor was she formally reprimanded." (*Id.* at 511) The court went on to note that "[o]n the contrary, Colson has alleged only that she was the victim of criticism, an investigation (or an attempt to start one), and false accusations: all harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence." (*Id.* at 512).

In the case at bar, the District Court also examined the chronology of the events and the allegations of the plaintiff Wells, citing the above quotations from *Colson* as authority with emphasis on "what did not happen" to Wells. (Opinion

at 28) The District Court noted that the Motion for Temporary Restraining Order was filed in the state court on October 29, 2004 and was promptly denied that very same day. At no time were there any charges filed against Wells, no grand jury was ever empanelled, Wells was never arrested and there was no investigation. At no time was there any prohibition on Wells' speech in any form - including his scheduled campaign events and appearances, print ads, publications and fliers, television and/or radio ads, or any other campaign activities. In fact, the state court denied the TRO requested by Lamz, in effect finding in favor of Wells.

Without question, the First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation for the exercise of that right. *See e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). However, not every action in response to an individual's exercise of his right to free speech is an actionable First Amendment harm. *See Colson,* 174 F.3d at 510. For example in the case of *Mattox v. City of Forest Park,* 183 F.3d 515, 522 (6th Cir.1999), the Court held that adverse publicity which caused a public official to lose her election was not the type of adverse action against which the First Amendment protects. Therefore, Petitioner Wells' claim for relief under § 1983 based on violation of his rights under the First Amendment must be dismissed.

The court in *Colson* stated and the District Court referenced in its Opinion that the alleged campaign of retaliation taken against Colson simply did not rise to the level of constitutional deprivation.

> "Even viewing the summary judgment evidence in the light most favorable to Colson, the defendants' allegedly retaliatory crusade

> amounted to no more than the sort of steady stream of false accusations and vehement criticism that any politician must expect to endure." *Cf. Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121,123 (5 Cir.1991) *Id.* at 514.

The District Court below appropriately relied on *Colson* in holding that any injury suffered by Wells was not of constitutional dimension. The ruling in the *Colson* case is dispositive of this issue. Petitioner Wells on appeal to the Fifth Circuit previously argued that the *Colson* case is not controlling "because the harm suffered in that case was more remote and less direct harm suffered by Wells." (Brief at page 27) Respondent Lamz respectfully disagrees. Far less happened to Mr. Wells than happened to Ms. Colson. Despite Petitioner's repeated and consistent claims that criminal charges were "filed" by virtue of the mention of the criminal sanctions set out in LSA-R.S. 18:1463(E) in the Request for TRO, no criminal charge was ever filed against Wells.

In this case, Petitioner Wells has failed to show that he was deprived of his constitutional right to free speech as a result of the filing of a state court petition on behalf of Defendant James Lamz for injunctive relief (TRO) dealing with campaign issues. Accordingly, Respondent Lamz submits that Petitioner Wells has not established any compelling reasons for this Court to grant the Petition and therefore the Petition should be denied.

SECOND PRONG: DEFENDANT LAMZ IS NOT A "STATE ACTOR" AND THE ACTIONS OF LAMZ DID NOT CONSTITUTE STATE ACTION

Wells' Complaint was filed against a private defendant James Lamz who cannot be labeled as a "state actor". Lamz is an attorney-at-law, in good standing, licensed and

practicing in the State of Louisiana and after successfully winning the election in November of 2004 has served as the Judge of Slidell City Court since that time. All the actions complained of by the plaintiff Wells are alleged to have occurred before the election.

At all times material herein, Lamz was a fellow candidate for judge to fill the Slidell City Court vacancy. "State action" requires some manner of state responsibility for the actions which underlie the 42 U.S.C. §1983 claim. *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 387 (5th Cir. 1985). A private person does not act under color of state law simply because he invokes state authority. *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991)

Conduct is fairly attributable to the state where: (1) it is "caused by the exercise of some right or privilege created by the state or by rule of conduct imposed by the State or for whom the state is responsible;" and (2) where the party charged with the deprivation is a person who may "fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).The first part of this test is easily met, but the second part requires Petitioner Wells to prove that Lamz's conduct may fairly be attributable to the state.

In *Lugar v. Edmunson Oil Co., Inc.*, 457 U.S. 922, 929-930 (1982), the court sets out three tests that could be used to meet this requirement. The *Lugar* case is addresses an essentially settled issue that does not merit this Court's attention. Even if this Court were inclined to address this issue, this case does not present such an opportunity because Petitioner never proffered any evidence that Lamz was a state actor or that Lamz was cognizant of any constitutional challenge to the State Election Code.

1. PETITIONER FAILS TO MEET ANY OF THE THREE PART TESTS IN *LUGAR* TO DETERMINE A "STATE ACTOR".

a.) Petitioner Fails to Meet Part 1 of *Lugar* - "Public Function Test"

The first test under *Lugar* is the "Public Function Test". Petitioner Wells continues to argue that the defendants including Lamz "filed" criminal charges. Despite his repeated and consistent claims that criminal charges were "filed" by virtue of the mention of the criminal sanctions set out in LSA-R.S. 18:1463(E) in the Request for TRO, no criminal charges were ever filed against Wells. Without question, the filing of charges is a function of the state; however, Lamz was not a state actor and was at all times pertinent herein a private individual who as a candidate for public office availed himself of the appropriate provisions of the Louisiana Election Code. There is nothing about the actions of Lamz that can be reasonably attributable to the state.

The most significant flaw in appellant's argument is that despite his insistence that there were, there were ***never*** criminal charges filed. Under the Louisiana Code of Criminal Procedure in order for criminal charges to be filed in a parish court, they have to be "instituted by affidavit or information charging any offense. La C. Cr. P. Art. 382(B)(2). This would require the involvement of the District Attorney and quite simply, this never happened.

What did occur is that Lamz then a fellow candidate for Judge, with the assistance of counsel, filed a request for injunctive relief in the Twenty-Second Judicial District Court for the Parish of St. Tammany, State of Louisiana, alleging that candidate Wells had violated the Election Code under LSA-R.S.18:1463. Under section E of this statute,

"[w]hoever violates any provision of this Section may be punished by a fine not to exceed five hundred dollars or be imprisoned for not more than six months or both." The fact that the provisions of the statute were outlined in the pleadings in the state court proceeding does not in any way make Lamz a state actor or pass the "public function test" in *Lugar*. In this case, there were never any criminal charges filed. Petitioner fails to meet part 1 of *Lugar* - the "Public Function Test"

b.) Petitioner Fails to Meet Part 2 of *Lugar* - "State Compulsion Test"

The second test under *Lugar* is the "State Compulsion Test" which provides that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Petitioner Wells argues that the state provided defendants the right of action under Louisiana Revised Statute 18:1463D(1) and that this is overt encouragement.

This argument is not valid. Obviously each state must provide its candidates for elective office an avenue and means to address their concerns regarding political speech and campaign material. Applying appellant Wells' argument to the facts of this case, there would either have to be no statute that allowed candidates to challenge their opponent's speech and publications or every action instituted regarding elections would fall under federal jurisdiction because the state provided the candidate with the avenue to seek an injunction. Applying Wells' logic would result in a flood of federal actions for each and every election throughout this state and the country. This argument is simply misplaced.

Furthermore, appellant Wells argues that the state provided the defendants with an avenue that limited his right to speech because he had to interrupt his campaigning to travel to the District Court and respond to the Request for TRO. Plaintiff Wells therefore complains on the one hand that he was given due process in the state proceedings and allowed to address those issues, but that on the other hand his right to speech was violated by the state since he could not campaign at the same time he was in court. Wells elected to represent himself in state court rather than continue campaigning. There was no court order or other prohibition against his right to campaign, to disseminate information or to print materials at any time pertinent herein. This test fails as well.

c.) Petitioner Fails to Meet Part 3 of *Lugar* - "nexus or joint action test"

The third test under *Lugar* is the "nexus or joint action test" which provides that the "state action may be found where the government has insinuated itself into a position of interdependence that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-358 (1974). Wells uses the same argument here as before, namely that the state provided an avenue for the defendants under LSA-R.S. 18:1463D and further that the state provided the use of their courts. Wells is suggesting that the state and Defendant Lamz are in joint participation because state courts are used to seek injunctive relief. Plaintiff's position is untenable.

In this case, Defendant Lamz as a private individual filed a state court lawsuit for injunctive relief alleging that Plaintiff Wells had violated Louisiana Revised Statute 18:1463

regulating elections, particularly section C(1) which provides that:

> [n]o person shall cause to be distributed or transmitted any oral visual or written material containing any statement which someone knows or should reasonably be expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters.

This statute specifically authorizes injunctive relief and provides for sanctions against violators. LSA-R.S. 18:1463 D(1) provides that "[A]n affected candidate or voter shall be entitled to an injunction to restrain future violations of Subsections B and C of this Section." Lamz filed his suit in state court for injunctive relief following the applicable law and utilizing the appropriate procedure.

There is no dispute and Petitioner Wells specifically admits in his Brief that the state court denied the TRO filed by Lamz on the very same day that it was filed. By filing the TRO in state court, Lamz was merely availing himself of the procedure set forth by the State of Louisiana for seeking injunctive relief under La. R.S. 18:1463 *et seq.*, and therefore cannot be deemed to be a state actor solely by virtue of doing so. In the alternative, for a private citizen to be held liable pursuant to §1983, "the plaintiff must allege that the citizen conspired with or acted in concert with state actors." See *Priester v. Lowndes County,* 354 F.3d 414, 420 (5th Cir.2004) and *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754. A private citizen must be a "willful participant in joint activity with the State or its agents." *Priester*, 354 F.3d at 420. Conclusory allegations of conspiracy, without reference to specific facts, will not suffice. *Id.*; *Brinkman v. Johnson*, 793 F.2d 111, 112-113 (5th Cir. 1986).

Petitioner has only made such veiled suggestions in one sentence of his Brief in which he writes on page 21 as follows:

> Here Thornhill and his law firm engaged in a conspiracy with Lamz and his committee, to usurp the United States Constitution by improperly seeking injunctive relief and criminal sanctions for the purpose of depriving Wells of federally protected rights. Consequently Thornhill and the Thornhill Law Firm, LLC meet the *Lugar* definition of state actors.

It should be noted that Petitioner does not assert in his Brief to this Court that Lamz is a state actor, although he has taken this position in the past.

At all times material herein, Defendant James Lamz was a private citizen. Therefore Wells must prove that Lamz was a willful participant in joint activity with the State or its agents, or that Lamz conspired with or acted in concert with state actors in order to implicate a cause of action under §1983. Petitioner has not set forth any factual allegations with respect to a conspiracy or a mutual understanding between Lamz and any state agent or official. A civil conspiracy pursuant to §1983 is an agreement between private and public actors to violate a plaintiff's constitutional rights. *Bayou Fleet, Inc. v. Alexander*, 68 F.Supp.2d 734, 745 (E.D. La. 1990)

Petitioner Wells argues that 42 U.S.C §1983 is implicated in this matter because in the underlying state matter, he called into question the constitutionality of Louisiana Revised Statute 18:1463. A similar argument was attempted in the case of *Parker v. Byrd & Wisner*, 947 F.Supp. 245 (S.D. Miss. 1996). In *Parker*, the Court held that the private attorney did not become a state actor by virtue of using the state

procedures for filing a lawsuit. The plaintiff in *Parker* also argued that 42 U.S.C §1983 was implicated because in the underlying state court action the defendants relied upon an unconstitutional state statute for their lawsuit. It was further argued that the defendants' state lawsuit amounted to malicious prosecution. The Court found those arguments to be without merit and subject to the same analysis the Court applied to the plaintiff's other arguments for the §1983 claims. *Parker*, 947 F.Supp. 245, 251. For the same reasons, this Honorable Court should reject such an argument.

This Court in *Lugar* faced a similar charge that private defendants' attachment suit was "unlawful under state law." *Lugar*, 457 U.S. at 940, 102 S.Ct. at 2755. In discussing this claim, the Court made plain that "private misuse of a state statute does not describe conduct that can be attributed to the State." *Id.* at 941, 102 S.Ct. at 2756. The choice to invoke the "statute without the grounds to do so could in no way be attributed to a state rule or state decision"; this act is "contrary to the relevant policy articulated by the state." *Id.* at 940, 102 S.Ct. at 2755. For this reason, complaints "alleg[ing] only misuse or abuse of the statute" do not "present a valid cause of action under §1983." *Id.* at 942, 102 S.Ct. at 2756.

As noted by the court in *Wyatt v. Cole* 994 F.2d 1113 (C.A.5 (Miss.),1993) "[i]n the wake of *Lugar*, several courts have recognized and given effect to this principle." *See, e.g., Davis Oil Co. v. Mills*, 873 F.2d 774, 779-80 (5th Cir. 1989) (discussing *Lugar*); *Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1335-36 (10th Cir.1992); *Hoai v. Vo*, 935 F.2d 308, 313-14 (D.C.Cir.1991), *cert. denied*, 503 U.S. 967, 112 S.Ct. 1578, 118 L.Ed.2d 220 (1992); *Jones v. Poindexter*, 903 F.2d 1006, 1010-11 (4th Cir.1990); *Collins v. Womancare*, 878 F.2d 1145, 1152-54 (9th Cir.1989), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990); *Winterland ConcessionsCo. v. Trela*, 735 F.2d 257, 262 (7th Cir.1984).

"OFFICER OF THE COURT" DOES NOT EQUAL "STATE ACTOR"

Petitioner Wells argues that pursuant to Louisiana Code of Civil Procedure Article 371, an attorney "by virtue of his status as an officer of the court" is therefore legislatively declared a state official and consequently a "state actor". This Article makes no such declaration, and reads in its entirety as follows:

> **Louisiana Code of Civil Procedure Article 371 - Attorney**
>
> An attorney at law is an officer of the court. He shall conduct himself at all times with decorum, and in a manner consistent with the dignity and authority of the court and the role which he himself should play in the administration of justice.
>
> He shall treat the court, its officers, jurors, witnesses, opposing party, and opposing counsel with due respect; shall not interrupt opposing counsel, or otherwise interfere with or impede the orderly dispatch of judicial business by the court; shall not knowingly encourage or produce false evidence; and shall not knowingly make any misrepresentation, or otherwise impose upon or deceive the court.
>
> For a violation of any of the provisions of this article, the attorney at law subjects himself to punishment for contempt of court, and such further disciplinary action as is otherwise provided by law.

Petitioner Wells and Respondent Lamz are both attorneys at law and were both candidates for the election to fill the seat for judge of Slidell City Court. To suggest that each and every attorney at law in the state of Louisiana is a "state actor" by virtue of LSA-Louisiana Code of Civil Procedure Article 371 is beyond reason and would open Pandora's Box to litigation and claims of state action under §1983 and other statutes.

Petitioner Wells argues that attorneys have been found to be state actors when they participate in a conspiracy to deprive plaintiffs of federal rights. Respondent submits that Petitioner Wells does not provide the complete facts from the cases cited which render the cases distinguishable from the facts of the case at bar.

For example, in the case of *Tower v. Glover,* 467 U.S. 914, 104 S.Ct. 2820 (U.S.1984), the client filed a *pro se* action alleging that the public defenders who represented him in his prior state criminal action violated civil rights statutes by conspiring with various public officials to violate their client's constitutional rights. This Supreme Court held that (1) the complaint adequately alleged conduct "under color of" state law in view of the conspiracy allegations, and (2) state public defenders are not immune from liability under §1983 for intentional misconduct by virtue of alleged conspiratorial actions with state officials which deprived their clients of federal rights.

In *Tower*, the public defenders were found to be state actors not by the mere fact that they were attorneys, but by their participation in the conspiracy with public officials. Therefore, the *Tower* decision is not inconsistent with the holding in *Polk County v. Dodson,* 454 U.S. 312, 102 S.Ct. 445 (U.S.,1981) that a public defender does not act "under color of state law" in performing a lawyer's traditional

functions as counsel to an indigent defendant in a state criminal proceeding.

In the case at bar, there is no allegation that Lamz or his attorney of record worked in joint participation with any state official in filing the Request for TRO. Lamz reasonably resorted to the legal process set out in the Louisiana Election Code. With the assistance of counsel and in accordance with the provisions of LSA-R.S. 18:1463, the Request for TRO was filed. The Request for TRO was immediately denied by the state court. There was no action by the state to deprive Wells of any rights. In fact, the state operated and acted to Wells' benefit – not to his detriment.

The case law simply does not support a finding that an action under §1983 exists merely because a lawyer filed a lawsuit based on what may be ultimately determined to be an unconstitutional statute. (See *Parker*, *supra*) The District Court correctly held that there was no constitutional deprivation to Wells in this case and stated as follows:

> THE COURT: I understand he was inconvenienced, but it doesn't rise to the color of state law, which I think is a closer question frankly. I feel that it requires the state to do something, to implement the alleged unconstitutional statute, other than simple act as a judge and rule on it. They would have to do something that would restrain him." (Doc. 51 at page 33 lines 16 through 21)

For the reasons set forth above, Petitioner Wells' arguments for converting Lamz to a state actor and Wells' suggestions that Lamz conspired in some way with other state actors or state officials should be rejected. Our courts have

consistently rejected attempts by litigants to define state action under §1983 as simply the use of the state's judicial process and procedures. See *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1242 (5th Cir. 1982)(the mere use of state process does not support a §1983 claim); See *Howard v. Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir.1988) (a litigant does not "act under color of state law" by merely filing a lawsuit and seeking a temporary injunctions); *Wyatt v. Cole*, 994 F.2d 1113, 1117-1118 (5th Cir.1993), cert.denied, 510 U.S. 977, 114 S.Ct. 470, 126 L.Ed.2d 421 (1993) (even the misuse or abuse of the judicial process does not constitute state action). Accordingly, Petitioner Wells has failed to show that defendant Lamz is a "state actor" and has failed all three parts of the *Lugar* test.

CONCLUSION

In conclusion, Petitioner Wells has not established a claim under 42 U.S.C. §1983. To prevail under 42 U.S.C. § 1983, a plaintiff must prove "(1) that he has been deprived of a right secured by the Constitution and the laws of the United States and (2) that the persons depriving him of this right acted under 'color of state law' of the state." (See *Daniel v. Ferguson*, 839 F.2d 1124 (5th Cir. 1988)). Petitioner has failed on both counts.

The District Court, after accepting the pleadings as true for the 12(b)(6) Motion found that there was no deprivation of Plaintiff's First Amendment right to freedom of speech. "The Plaintiff can't show that any of his speech was actually restrained." (Opinion at page 45 lines 16-17) The District Court rightly addressed the similarities to the *Colson* case in finding that there was no deprivation. The District Court cited the *Colson* decision where the court stated "[a]ccordingly, this circuit has held that although some actions may have the effect of chilling the plaintiff's protected speech, they

are not actionable." (Opinion at page 47 citing *Colson* at page 511) The District Court went on to rule that the plaintiff Wells could not show the sufficient chilling effect on his speech for there to be a constitutional deprivation.

In addition, the District Court correctly applied the applicable law to the facts and held that there was no state action in this case "because the state under all the tests, something has to be done, even if it's unwitting by the state, as it was with the sheriff in the replevin case." (Opinion at page 49 lines 20-23) "[N]o action was taken here by the state. The state did nothing – did not use these procedures against this gentlemen." (Opinion at page 49 line 25 through page 50 line 2) The District Court went on to note that even if criminal charges were filed in this matter, under the case law the simple filing of state charges is not sufficient to establish state action.

Petitioner Wells failed to satisfy both prongs of the analysis in *Lugar*. Respondent Lamz was not a state actor, and at no time was acting under the color of state law. As a judicial candidate, Lamz utilized the provisions of the Louisiana Election Code under LSA-R.S. 18:1463 and requested a TRO from the state court based on his concerns of improper campaign practices by Wells. The reference in the Request for TRO of the criminal sanctions provided for in the statute does not of itself rise to the level of state action nor does the fact that Lamz is an attorney-at-law make him a state official. The District Court appropriately granted the Motion to Dismiss pursuant to Rule 12(b)(6) filed by Lamz and the Fifth Circuit properly affirmed.

Accordingly, Respondent Lamz submits that Petitioner Wells has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent Lamz respectfully requests that the Petition be denied.

Respectfully submitted,

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